HARVARD

LAW REVIEW.

VOL. XIV. MAY, 1900. NO. 1

THE FOURTEENTH AMENDMENT AND SPECIAL ASSESSMENTS ON REAL ESTATE — NORWOOD *v.* BAKER, 172 U. S. 269.

Does the Fourteenth Amendment to the Constitution of the United States prohibit "assessments" on real estate in excess of special benefits, or by any other method than according to special benefits?

WHAT was decided by the Supreme Court of the United States in Norwood *v.* Baker[1] sufficiently appears in the following quotations from the opinion of the court (p. 290): —

"The statute authorizes a special assessment upon the bounding and abutting property by the front foot for the entire cost and expense of the improvement, without taking special benefits into account. And that was the method pursued by the village of Norwood. The corporation manifestly proceeded upon the theory that the abutting property could be made to bear the whole cost of the improvement, whether such property was benefited or not to the extent of such cost. . . . As the pleadings show, the village proceeded upon the theory, justified by the words of the statute, that the entire cost incurred in opening the street, including the value of the property appropriated, could, when the assessment was by the front foot, be put upon the abutting property, irrespective of special benefits."

The court therefore decided (pp. 291, 292): —

[1] 172 U. S. 269.

"The assessment was in itself an illegal one, because it rested upon a basis that excluded any consideration of benefits. A decree enjoining the whole assessment was therefore the only appropriate one. . . . The present case is one of illegal assessment under a *rule or system* which, as we have stated, violated the Constitution, in that the entire cost of the street improvement was imposed upon the abutting property by the front foot, without any reference to special benefits."

The suit was brought by the plaintiff Baker in the Circuit Court of the United States for the Southern District of Ohio to enjoin the enforcement of such assessment, on the ground that it violated the Fourteenth Amendment to the Constitution of the United States. The Supreme Court on this point said (p. 277): —

"The plaintiff's suit proceeded upon the ground, distinctly stated, that the assessment in question was in violation of the Fourteenth Amendment providing that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, as well as of the Bill of Rights of the Constitution of Ohio."

The following proposition was laid down by the court (p. 279): —

"In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation."

The Supreme Court expressly placed its decision upon the ground that the assessment violated the Fourteenth Amendment to the Constitution of the United States, saying (p. 296): —

"We have considered the question presented for our determination with reference only to the provisions of the national Constitution."

The court, however, added (p. 296): —

"But we are also of opinion that, under any view of that question different from the one taken in this opinion, the requirement of the constitution of Ohio that compensation be made for private property taken for public use, and that such compensation must be assessed 'without deduction for benefits to any property of the owner,' would be of little practical value if, upon the opening of a public street through private property, the abutting property of the owner, whose land was taken for the street, can, under legislative authority, be assessed not only for such amount as will be equal to the benefits received, but for such additional amount as will meet the excess of expense over benefits."

At the conclusion of its opinion the court announced its decision in the following words (p. 297): —

"The judgment of the Circuit Court must be affirmed upon the ground that the assessment against the plaintiff's abutting property was under a rule which excluded any inquiry as to special benefits, and the necessary operation of which was, to the extent of the excess of the cost of opening the street in question over any special benefits accruing to the abutting property therefrom, to take private property for public use without compensation; and it is so ordered."

The Supreme Court of the United States in this case of Norwood *v.* Baker has thus distinctly held that it is contrary to the Fourteenth Amendment to the Constitution of the United States for a state, or a municipality within a state, to assess the cost of laying out a public street (including the cost of the land taken for that purpose) *by the front foot*, upon the land bounding and abutting upon such public street.[1]

Assessments are made under the taxing power. This is stated by the court in Norwood *v.* Baker (p. 277): —

"But the assessment of the abutting property for the cost and expense incurred by the village was an exercise of the power of taxation."

So also Judge Cooley says: —

"That these assessments are an exercise of the taxing power has over and over again been affirmed until the controversy must be regarded as closed," citing a large number of authorities.[2]

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[1] The far-reaching effect of this decision of the Supreme Court in Norwood *v.* Baker, if the principles therein stated are adhered to by that court and carried to their logical conclusion, can hardly be overestimated. The text of this article considers the general effect of that decision. A number of decisions have been made by other courts, in which the principles stated by the Supreme Court have been applied to particular statutes and cases arising under them. Thus, the Supreme Court of Texas in the case of Hutcheson *v.* Storrie, 92 Tex. 685, acting under the supposed compulsion of the decision in Norwood *v.* Baker, has held a front foot assessment invalid, and overruled its prior decisions which held similar assessments valid. Decisions holding statutes invalid which provided for assessments by front foot have been rendered in the following cases: Loeb *v.* Trustees of Columbia Township, 91 Fed. Rep. 37 (Ohio statute); Fay *v.* City of Springfield, 94 Fed Rep. 409 (Missouri statute); Charles *v.* City of Marion, 98 Fed. Rep. 166 (Indiana statute); Lyon *v.* Town of Tonawanda, 98 Fed. Rep. 361 (New York statute).

When it is considered that many states have in a long period of years enacted a multitude of similar statutes authorizing assessments and in many instances the issuing of assessment bonds, the great importance of this decision of the Supreme Court in Norwood *v.* Baker is obvious, even if that decision be restricted in its application so as to embrace only assessments by the front foot. But such a restricted application seems inconsistent with the principles stated by the Supreme Court.

[2] Cooley on Taxation, 2d ed. p. 623. See, also, to the same effect, Dillon on Municipal Corporations, 4th ed. § 752.

It can hardly be supposed that the Fourteenth Amendment to the Constitution of the United States requires that all state taxes be levied only according to benefits received, and not in excess of benefits received, by the person or thing taxed, nor that an equal compensation be made for every tax levied. The Supreme Court has not so decided. Any such rule would render invalid all the ordinary *ad valorem* taxes as well as many others. Obviously, if any such rule of *quid pro quo* is to be applied in the case of assessments as distinguished from other taxes generally, there must be some distinction or line of demarcation between assessments and other taxes, and the Fourteenth Amendment to the Constitution of the United States must somehow make such distinction and line of demarcation. A tax may be defined as a payment or contribution required by the government to be made for public purposes. This definition is intended to include, and does include, an assessment as well as any other tax. Worcester defines tax as follows: —

"A sum imposed or levied by government or other authority; a rate; a duty; a tribute; an excise; an impost; an assessment; a custom."

While Worcester's definition is correct, yet under our system of government a tax must be for a public purpose.

The taxing power necessarily involves and includes among other things the *power of apportionment*, that is, the power to choose the persons or things to be taxed, and to prescribe what amount or share each shall pay, or according to what rule or measure the amount or share to be paid by each shall be determined. It would be idle for a legislative body to enact that so many dollars tax be paid to the government, unless it also went further and prescribed what persons or things should pay the same, and in what amounts or according to what measure or rule. "Taxes cannot be laid without apportionment." [1]

Probably the first and chief impression which is produced upon the minds of most persons by the word "assessment" is that it is a contribution levied upon real estate *different* from the ordinary *ad valorem* contribution to which we are more accustomed and to which we ordinarily give the name of tax. Exactly what the difference is seems generally not much considered. There may also be, and doubtless usually is, associated with the word "assessment," the idea that it is a contribution levied upon real estate because of some *special benefit* that is conferred or supposed to be conferred upon such real estate by some public improvement. So far, every

[1] People *v.* Brooklyn, 4 N. Y. 419, 427.

one will no doubt agree. It is necessary to consider, however, whether this reason, namely, special benefits, is one (*a*) which is addressed to the discretion of a state legislative body, or (*b*) compelled by a state constitution, or (*c*) compelled by the Fourteenth Amendment to the Constitution of the United States.

It is obvious that so far as this is a reason (*a*) addressed to the discretion of a state legislative body, it is one which neither the United States courts nor the state courts can enforce.

If, and so far as, this is a reason (*b*) compelled by a state constitution, it cannot be enforced by the United States courts except as a matter of state law, in a case where those courts have jurisdiction on other grounds, as, for example, that the case is one between citizens of different states. No federal question is presented by any supposed violation of a state constitution in this respect.[1]

If this is a reason (*c*) compelled by the Fourteenth Amendment to the Constitution of the United States, then, in order that any rule based thereon may be intelligible or capable of enforcement, there must be some legal meaning and definition given to the word "assessment." In other words, if the Fourteenth Amendment prohibits assessments on real estate in excess of special benefits, or by any other method than according to special benefits, it is necessary to define what is meant by an assessment as used in such rule of prohibition. Observe that what must be defined is the word "assessment" *as used in such rule under the Fourteenth Amendment.* The question is not what the word "assessment" means as used in a state statute or in a state constitution, or in ordinary language without special reference to any statute or constitution.

We are considering in this article assessments by state legislative bodies. Hence we must keep in mind the nature and extent of the taxing power of the states. The persons and things that may be taxed by the states are almost innumerable, and new objects of taxation are constantly being found. Indeed, it is to be feared that the person who invents a new tax is looked upon by some persons as a public benefactor, rather than he who abolishes an existing one. Generally speaking, the states may tax all things except those few which are by the Constitution of the United States reserved for Congress alone to regulate and tax. Land and the improvements thereon are not among the things left by the Constitution of the United States to be regulated and taxed by Congress alone. The power to levy these state taxes of all kinds,

[1] Jackson *v.* Lamphire, 2 Pet. 289; Medberry *v.* Ohio, 24 How. 413; Salomons *v.* Graham, 15 Wall. 208; Spencer *v.* Merchant, 125 U. S. 345, 352.

by whatever name they are called (whether assessments or any other name), rests with the state legislative bodies, subject of course to any provisions of the state constitution.

It is probable that all state taxes are alike, so far as the Fourteenth Amendment is concerned, in this respect, namely, that any tax must be for a public purpose[1] (although I do not recollect any case in which the United States Supreme Court has decided that the Fourteenth Amendment invalidated a state tax levied for a private purpose); and alike in this also, that, so long as the purpose is public, a tax may be levied upon any or all of the persons or things within the jurisdiction of the State which are not reserved by the Constitution of the United States to be regulated and taxed by Congress alone. When the legislative body has prescribed the purpose of a tax, it must also apportion the tax, that is, designate the persons or things which are to pay the same, and prescribe the amount to be paid by each, or the rule or measure of dividing the amount among such persons or things.

An assessment such as the one in Norwood *v.* Baker is to be distinguished from other taxes in this, that it is apportioned according to a rule or measure different from that adopted in respect of some other taxes. The rule of apportionment in that case was the front foot rule. The court says that this rule is erroneous, because assessments must be levied according to special benefits, or at least not in excess of special benefits, conferred by the improvement the cost of which is paid out of the assessment. What the court holds invalid is the apportionment. The purpose of the tax was valid. The court, however, in laying down this proposition, does not define what it means by an assessment further than such definition may be implied from the facts of the particular case. The court, for example, does not say that all taxes on real estate other than the ordinary *ad valorem* tax are to be called assessments within the meaning of its rule deduced from the Fourteenth Amendment. Nor does the court otherwise define what it means by assessments. In other words, unless the word "assessment" has a definite legal meaning, the court, in saying that assessments must be apportioned according to benefits or not in excess of benefits, has not made clear what taxes must be so apportioned, for it has not defined assessments. It is necessary, therefore, to consider whether the word "assessment" has any definite legal meaning in which it may have been used by the court in laying down its proposition under the Fourteenth Amendment.

[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112; Missouri Pacific Railway Company *v.* Nebraska, 164 U. S. 403.

The courts in New Jersey have attempted to describe or define assessment in some such way as this, namely, that whatever contribution is levied on any real estate less than the whole of the real estate in a political subdivision of a state is an assessment; and they hold that such assessment must not be levied in excess of the special benefits received by the real estate upon which it is levied. Whether or not this is a good decision under the New Jersey constitution is a question with which we have at present nothing to do. Let us suppose, however, that some such distinction be attempted under the Fourteenth Amendment to the Constitution of the United States. In other words, let us assume for the sake of the argument that the Fourteenth Amendment prohibits any tax upon any real estate less than the whole of the real estate embraced in a political subdivision other than a tax according to special benefits, or a tax which shall not exceed the special benefits, derived by the real estate from the improvement to pay the cost of which the tax is levied. If this be a rule prescribed by the Fourteenth Amendment, then obviously it is a rule which must be enforced by the United States courts at all hazards, and which cannot be overridden or circumvented or abolished or in any wise affected by the constitution or statutes of a state. Let us suppose that while this rule is in force the legislature of a state undertakes to levy an assessment by the front foot, or by area, or *ad valorem*, or by some other measure than according to benefit, in a part only of a municipality. All that the legislature will need to do in order to accomplish this undertaking will be to erect the territory covered by the assessment into some sort of municipality, and then levy the tax, and then, presto, the tax will be good notwithstanding the Fourteenth Amendment, because it is a tax or assessment levied upon the entire real estate within the whole of a "political subdivision" of the state.

It has been decided in numerous cases in the Supreme Court of the United States that the matter of the creation and dissolution of municipalities or political subdivisions of the state is a matter solely for the constitution and statutes of the states.[1] The state governments, in the exercise of their proper functions, cannot be interfered with by the federal government. One of these functions is the creation and control of municipalities or subdivisions of the state for the purpose of carrying on the state government. Such subdivisions of the state are, so far as the federal government is concerned, mere agencies of the state. As the federal government

[1] See Missouri *v.* Lewis, 101 U. S. 22, and Detroit *v.* Osborne, 135 U. S. 492.

cannot interfere with a state in the proper exercise of its functions, so it cannot interfere with these subdivisions and agencies of the state. For this reason the federal government cannot even tax such subdivisions or agencies or their bonds or other obligations.[1] Much less can the federal government interfere with the states in the creation and dissolution of such subdivisions or agencies. Obviously, therefore, the definition of "assessment" on which certain New Jersey cases rest, when applied to the word "assessment" in the rule laid down by the Supreme Court in Norwood *v.* Baker, makes any supposed requirement of the Fourteenth Amendment that assessments be not in excess of benefits an illusory requirement, and one which can be circumvented and evaded by the states by the mere act of creating new and different municipalities or political subdivisions of the state.

Furthermore, so far as the Fourteenth Amendment is concerned, it will not help the definition any to say (as some of the New Jersey decisions do as a matter of state law, which we need not now criticise) that an assessment is a contribution levied in any *previously* created political subdivision of the state on any real estate less than the whole of the real estate in such *previously* created political subdivision; for all that the legislature of the state would need to do in that event in order to evade the supposed requirement of the Fourteenth Amendment would be first to create a new political subdivision, and then by a statute enacted a few days later make provision for the levy of an assessment or tax therein on some other basis than according to benefits, as, for example, according to front foot, value, or area. The customary and orderly procedure of the legislatures of the states is to make in the very statute creating a political subdivision full and adequate provision for taxes and assessments for the government and administration of the same and the performance of its functions. Any doctrine under the Fourteenth Amendment which involves the proposition that the power to levy assessments and taxes cannot be conferred upon a political subdivision of a state at the time of the creation of such subdivision, but must be in some later act, would certainly be strange and novel.

So, also, it is immaterial that the functions of the subdivision or taxing district of the state be many or few. This is a matter for the state legislative body to determine, subject only to such restrictions as the state constitution may impose. Furthermore, it

[1] Pollock *v.* Farmers' Loan & Trust Company, 157 U. S. 429, 583-586, and cases there cited; s. c. on rehearing, 158 U. S. 601.

would be idle for the Supreme Court of the United States to make any definition of assessment for the purposes of the Fourteenth Amendment based upon the distinction whether the taxes are levied upon the property in an entire political subdivision of the state, or only in a part of such political subdivision, without at the same time defining and stating what is meant by a political subdivision. It would be necessary, moreover, in order to have any such definition effective, that such subdivision be not subject to change at the will of the state.

It may possibly be objected that some of the considerations here set forth do not apply in the case of Norwood *v.* Baker, that it cannot be permissible for a state to create a political subdivision of the state or district of the state comprised only of the land of a single individual, such as the land of Baker. In other words, it may be suggested that the power of a state to create political subdivisions is limited by the United States Constitution. The contrary has, however, been repeatedly decided by the United States Supreme Court. Another answer to any such suggestion or objection is that the Supreme Court did not place its decision in Norwood *v.* Baker on any such ground, but placed it distinctly on the ground that the Fourteenth Amendment prohibited any assessment apportioned by the front foot, because such assessment necessarily excluded any inquiry in regard to the benefits received. No distinction was made or attempted to be made as to whether the title to the land assessed was in a single individual owner or in several owners. Indeed, it would be difficult to find any substantial legal ground for such a distinction. It often happens that large and valuable tracts of land are owned by a single individual. Thus, for example, in the city of New York certain well-known persons own block after block of valuable lands with numerous houses thereon. It cannot be that under the Fourteenth Amendment to the Constitution of the United States these blocks of land and the houses thereon cannot be assessed for a local public improvement precisely as well when the title is in a single individual as if the title were in several individuals. There is no legal or moral reason for any such discrimination. The assessment in Norwood *v.* Baker was made and apportioned according to well-recognized and long established usage. That this assessment was in no wise peculiar is shown elsewhere in this article. The street was constructed through certain land in the village and the cost assessed upon the abutting land. It was a mere accident that the owner happened to be a single individual.

An assessment, therefore, as that word is used in the rule or proposition decided by the Supreme Court in Norwood *v.* Baker cannot be defined as a contribution levied on some real estate less than the whole of the real estate in a political subdivision of the state, or in a previously created political subdivision of the state.

Neither can the word "assessment" as thus used be defined as a tax levied upon real estate other than an *ad valorem* tax; for what the Supreme Court has called assessments have been levied upon real estate *ad valorem* and have been held valid by that court.[1] Furthermore, an assessment *ad valorem* or a tax *ad valorem*, whichever it may be called, obviously violates the rule or proposition laid down by the court in Norwood *v.* Baker, for such an assessment *ad valorem* or tax *ad valorem* is necessarily not levied according to benefit, and may often be in excess of benefit, conferred upon the property taxed. The principle laid down by the court in that case, namely (p. 279), "the exaction from the owner of private property in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation," would condemn a tax or assessment *ad valorem* equally with a tax or assessment according to the front foot. An assessment within the meaning of the proposition stated by the court cannot, therefore, be defined as a tax levied upon real estate other than an *ad valorem* tax, for that proposition is inconsistent with any such definition.

If there is any other definition or attempt at definition of the word "assessment" as used in this rule or proposition of the Supreme Court under the Fourteenth Amendment, or any definite legal meaning which would be applicable to the word "assessment" in such rule or proposition, I have not been able to find it either in the decisions of the courts or in any of the text-books. So far as the Fourteenth Amendment is concerned, there is no distinction between an "assessment" and a "tax." No such distinction is expressed in the language of that amendment, or implied therein. If the Fourteenth Amendment deals with state taxation at all, it must deal with the genus tax and not alone with an arbitrarily named and undefined or undefinable species "assessment."

The examination of this case of Norwood *v.* Baker has proceeded far enough to show some of the questions and principles involved. Before examining it further, let us take a brief review

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[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112.

of the history and purpose of the first section of the Fourteenth Amendment, and especially of the clause which provides: —

"Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If we examine the history of the words "due process of law" in England, we find that they have had, generally speaking, no connection with questions of taxation. The words do not occur at all in Magna Charta. The thirty-ninth section of Magna Charta provides: —

"39. No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or destroyed in any other manner, nor will we go upon him or send upon him, except by the lawful judgment of his peers or the law of the land."

This section was copied in later English charters. It deals chiefly with the *liberty of person* of the subject. The form in which this section of Magna Charta appeared in the Articles which the Barons demanded of King John was as follows: —

"29. The *body* [*corpus*] of a free man shall not be taken, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor in any other manner destroyed, nor shall the King go or send upon him by force, except by the judgment of his peers or the law of the land."

When the charter came to deal with the question of *taxation*, the only limitation, generally speaking, was that contained in the twelfth section, to wit: —

"No scutage or aid shall be levied in our kingdom, *except by the Common Council of our realm*" (except the three regular aids).

This distinction continues all through the English constitutional history, and the only limitation placed upon the power of *taxation* is that taxes shall be levied by the legislative body, that is, Parliament.

The words "due process of law" appear for the first time in any of the great documents that form part of English constitutional history, in the Petition of Right to Charles I. In the 4th section of this Petition it is recited: —

"That in the eighth and twentieth year of the reign of King Edward III. it was declared and enacted by authority of Parliament that no man of what estate or condition that he may be should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death, without being brought to answer by *due process of law*."

The statute, 28 Edw. III.,[1] referred to, is as follows: —

"*No person shall be condemned without his answer.*"

"Item — That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken nor imprisoned, nor disinherited, nor put to death, without being brought in answer by *due process of the law.*" [2]

Another statute, Edw. III.,[3] was as follows: —

"*None shall be condemned upon suggestion without lawful presentment.*"

"Item — Whereas, it is contained in the great charter of the franchises of England that none shall be imprisoned nor put out of his freehold, nor of his franchises, nor free custom, unless it be by the law of the land, it is accorded, assented and established, That from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner, or *by process* made by writ original at the common law; nor that none be out of his franchises nor of his freeholds unless he be duly brought into answer and forejudged of the same *by the course of the law*, and if anything be done against the same it shall be redressed and holden for none." [4]

The Petition of Right also recited the 39th section of Magna Charta, above quoted, and then, in the 5th section, recited: —

"Nevertheless, against the tenor of the said statutes and other the good laws and statutes of your realm, to that end provided, divers of your subjects have of late been imprisoned without any cause showed; and when for their deliverance they were brought before your justices by your Majesty's writs of *habeas corpus*, there to undergo and receive as the court should order, and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by your Majesty's special command, signified by the lords of your Privy Council, and yet were returned back to several prisons, without being charged with anything to which they might make answer, *according to the law.*"

The 7th section recites the condemnation of men by commissioners appointed to preside according to the justice of martial law. The petition prays, among other things, that no freeman in any such manner as is before mentioned be imprisoned or detained, and that the commissions for proceeding by martial law may be revoked, and no commissions of like nature thereafter issued.

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[1] 28 Edw. III., c. III.
[2] Statutes at Large, p. 97.
[3] 25 Edw. III., Stat. 5, c. 4.
[4] 2 Statutes at Large, p. 53.

All this, it will be observed, relates to the *personal liberty* of the subject and to his security in the possession of his lands. But when the Petition of Right came to deal with the question of *taxation,* it referred to certain statutes, and then said: —

"By which statutes before mentioned and other the good laws and statutes of this realm, your subjects have inherited this freedom, that they should not be compelled to contribute to any tax, tallage, aid, or other like charge *not set by common consent in Parliament.*"

And then the next section recites that the people have been required to make forced loans, and that various other charges have been levied by lord lieutenants, deputy lieutenants, etc., against the laws and free customs of the realm. And in respect of *taxation,* the prayer of the petition is as follows: —

"They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make any gift, loan, benevolence, tax, or such like charge *without common consent by act of Parliament.*"

The Habeas Corpus Act of 31 Charles II., section 6, provides that no person who

"shall be delivered or set at large upon any *habeas corpus,* shall at any time hereafter be again imprisoned or committed for the same offence by any person or persons whatsoever, other than by the *legal order and process of* such court," etc.

And other parts of the act use the words "due course of law."

The Bill of Rights recites that King James and his ministers, etc., did endeavor to subvert the laws and liberties of the kingdom, among other things: —

"By erecting a Court of Commissioners for Ecclesiastical Causes.

"By prosecuting in the Court of King's Bench for matters and causes cognizable only in Parliament; and by divers other arbitrary and illegal courses," etc.

And the Bill of Rights then proceeds to declare, section 3: —

"That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious."

It deals with matters of *taxation* in a separate section, and provides: —

"4. That levying money for or to the use of the Crown, by pretence of prerogative, *without grant of Parliament,* for longer time or in other manner than the same is or shall be granted, is illegal."

The above quotations and references to the Great Charter, the Petition of Right, and the Bill of Rights show that, in the development of the rights and liberties of the English people, the only constitutional limitation placed upon the power of taxation was that it should be by act of the legislative body, that is, by Parliament, and that the words "due process of law" were used and applied only in reference to the liberty of the subject to have his person and property free from arbitrary seizure, etc., and did not have any proper application to the apportionment of taxes by the legislative department of the government.

In all the contests between the American Colonies and Great Britain, before the Declaration of Independence, the only complaint in regard to taxation was that the Colonies were taxed without representation in Parliament. The motto was, "No taxation without representation." It has always been assumed that if there had been representation in the legislative body, no complaint could or would have been made in respect of taxation or of the collection of taxes other than such complaint as might be addressed to the discretion of the legislative body by petition or otherwise. Thus, Mr. Chief Justice Fuller, giving the opinion of the court in Pollock *v.* Farmers' Loan and Trust Company,[1] says (p. 556): —

"The men who framed and adopted that instrument had just emerged from the struggle for independence, whose rallying cry had been that 'taxation and representation go together.'

"The mother country had taught the colonists, in the contests waged to establish that taxes could not be imposed by the sovereign except as they were granted by the representatives of the realm, that self-taxation constituted the main security against oppression."

The principles on which the clause as to due process of law in the Fourteenth Amendment of the Constitution of the United States should be construed are well stated by the Supreme Court in Mattox *v.* United States.[2] In that case it was held that the provision of the Constitution which required that the accused shall "be confronted with the witnesses against him" was not violated by permitting the testimony of witnesses sworn upon a former trial to be read against him. Mr. Justice Brown, giving the opinion of the court, said (p. 243): —

"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such

[1] 157 U. S. 429.

[2] 156 U. S. 237.

as he already possessed as a British subject — such as his ancestors had inherited and defended since the days of Magna Charta."

Judge Ruggles, giving the opinion of the New York Court of Appeals in the well-known leading case of People *v.* Brooklyn,[1] speaking of "those clauses in the constitution [of New York] which declare that no person shall be deprived of his property without due process of law, and that private property shall not be taken for public use without just compensation," says (p. 423): "Neither of these prohibitions applies to taxation." This language of the learned judge was used with reference to the question of the power of the legislature to tax, including the power to apportion the tax. This is not stating that the words "due process of law" in the Fourteenth Amendment, or in similar provisions in the state constitutions, do not or may not apply to *proceedings for enforcing the payment of a tax*, such as action in the courts to obtain judgment for a tax and proceedings for the collection of the same, the seizure and sale of property to satisfy the tax, or the arrest and imprisonment of the person with a view to enforcing payment. Such proceedings may in some instances be judicial in their nature, and may require notice, hearing, and judicial decision. But even as to some of such proceedings summary seizure under a warrant does not violate the due process of law required by the Fifth Amendment to the Constitution of the United States or by the Fourteenth Amendment.[2]

Historically, then, it seems clear that the words "due process of law" found in the Fourteenth Amendment have no reference to the exercise of the power to tax, including the power to apportion taxes. The protection against unfair or excessive taxation is found in those parts of the constitutions of the several states and of the United States which assure a representative government, that is, a government in which the legislators are elected by the people. The historic requirement that there shall be no taxation without representation is thus fully satisfied.

It is not the proper course for the people to wait supinely until after the legislative body of the state or of any municipal subdivision of the state has imposed unfair or excessive taxes, and then, in order to prevent the taxes being levied and apportioned on the basis prescribed by the legislative body, appeal to the

[1] 4 N. Y. 419.

[2] Murray's Lessee *v.* Hoboken, etc. Land Company, 18 How. 272; McMillen *v.* Anderson, 95 U. S. 37, and cases cited. See, also, Judge Cooley's opinion in Weimer *v.* Bunbury, 30 Mich. 201 (1874).

protection of the Supreme Court of the United States, instead of electing proper legislators and appealing to the legislative body. Such conduct would proceed upon the theory that proper legislators cannot be elected, and that the legislative bodies cannot be trusted, and cannot even be properly influenced by the people, in the matter of the levy and apportionment of taxes, but that the United States courts and especially the Supreme Court constitute the protection of the citizen against unfair or oppressive taxation. This theory or assumption is not, however, in accordance with the history and spirit of our government and institutions, and it is not supported by the facts. The people of our country can be trusted. The citizens of our states as well as the members of legislative bodies of our states are as a rule naturally fair-minded, and it is not generally true that an appeal to them which is just is disregarded. There may be from time to time differences of opinion, but generally and in the long run a cause or an appeal that is in itself right commends itself to the citizens and the legislators, and is bound to succeed. If this be not so, and if the legislators of the county, or if the citizens of the country who ultimately are responsible for the kind of legislators who are elected, cannot be trusted to deal fairly and justly in the matter of the levy and apportionment of taxes, then our democratic government is in this important respect a failure. But the conclusion that it is such failure would prove too much, for it must be obvious that in the last analysis the Constitution and the Supreme Court itself are under the control of the citizens, and if they persistently desire the enactment of any particular legislation or the adoption of any particular policy on the part of the government, they have the power in the long run to have such legislation or policy adopted. There is no ultimate check but the people themselves.

Accordingly, we find that the courts have declined to interfere with the levy and apportionment of taxes by the legislative bodies, and have frequently stated that the proper remedy for unfair or excessive taxation is to appeal to the legislative bodies and to elect better men, if necessary, as legislators. Thus, Chief Justice Marshall, in Providence Bank *v.* Billings,[1] in a tax case on writ of error to the Supreme Court of Rhode Island, says (p. 563): —

"However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may

[1] 4 Pet. 514.

be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally. This principle was laid down in the case of M'Culloch *v.* The State of Maryland, 4 W. 316, and in Osborn et al. *v.* The Bank of the United States, 9 W. 738."

In the case of the County of Mobile *v.* Kimball,[1] the question was whether a tax to pay bonds for the improvement of the river, bay, and harbor of Mobile, levied solely upon the county of Mobile, and not at all upon the rest of the state of Alabama, which it was conceded would derive some benefit from the improvement, was a taking of property without due process of law. Mr. Justice Field, giving the opinion of the Supreme Court, says (p. 704): —

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole state, among all its counties. But this court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive state legislation. The judicial power of the federal government can only be invoked when some right under the Constitution, laws, or treaties of the United States is invaded. In all other cases the only remedy for the evils complained of rests with the people and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests."

So, also, Chief Justice Shaw, in Norwich *v.* County Commissioners of Hampshire,[2] which was a petition for a *mandamus* to compel the county commissioners to build a bridge under a special act at the expense of the county, whereas under the operation of the general laws, without this special act, the expense would be borne wholly by the town, said: —

"It will not throw much light on a question like this to put extreme cases of the abuse of such a power to test the existence of the power itself. It is said that the expense of erecting bridges in one section of the commonwealth may be charged upon the inhabitants of another. . . . The possibility that such a power may be abused has but a slight

[1] 102 U. S. 691.

[2] 13 Pick. 60.

tendency to prove that it does not exist. There are a variety of other cases in which it would be easy to suggest a possible gross abuse of legislative powers, but in which there can be no possible question of the existence of the power itself under the express provisions of the Constitution."

The events that caused or occasioned the adoption of the Fourteenth Amendment also show that the view here presented is the correct one, namely, that the words "due process of law" were not intended to have anything to do with the levy and apportionment of taxes. This amendment was proposed to the legislatures of the several states by Congress on June 16, 1866, soon after the close of the civil war. The occasion and chief purpose of its adoption were the protection of the negroes in their newly created rights of citizenship, — rights such as had been enjoyed by our English ancestors and handed down by them and enjoyed by white persons in the United States. Most of the states already had in their constitutions the clause against depriving any person of life, liberty, or property without due process of law, which clause was enforcible in the state tribunals, and had theretofore been enforced, as to white persons; and the Fifth Amendment to the Constitution of the United States contained among other things a similar clause applicable to the United States government and enforcible in its tribunals. The Fourteenth Amendment had the effect of putting this guaranty and prohibition under the protection of the federal tribunals, in which could be sought redress for any violation of the same by the states as to white persons and colored persons alike. Neither the section itself, however, nor the history of its adoption, lends any support to the view that it was intended to lay down a new rule enforcible by the federal courts as to the method of apportionment of state taxes in the states. The section does not mention taxation. The words used in this section are the historic words which came down from Magna Charta and other statutes and documents in English constitutional history, and appear in the Fifth Amendment to the Constitution of the United States, and also appear in most, if not all, of the constitutions of the several states, and have historically no connection with the imposition of taxes. The protection afforded the citizen against unjust and oppressive taxation was found in other clauses of the Constitution, namely, those clauses which provided a representative government, and thus gave assurance that there should be no taxation without representation, and also in certain other clauses in the constitutions of the several states and of the United States which mentioned and undertook to deal with the subject of taxa-

tion. These words used in this section 1 of the Fourteenth Amendment to the Constitution of the United States have to do with the personal liberty of the citizen and the freedom of his property from arbitrary seizure; but not with the levy and apportionment of taxes. If these historic words were intended to be used in a new sense and to introduce a new constitutional prohibition as to apportioning state taxes, it is strange that the amendment did not expressly so state. As to the proper rule or principle to be applied in the construction of such a historic clause in the Constitution, see Mattox *v.* United States, *supra.*

Harry Hubbard.

195 BROADWAY, NEW YORK, January, 1900.

[To be continued.]